No. 21813

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

SWITCHMEN'S UNION OF NORTH AMERICA, et al,
Appellants,

v.

SOUTHERN PACIFIC COMPANY,
Appellee.

Appeal From the United States District Court
For the Northern District of California
Southern Division

BRIEF OF APPELLANTS

LEO M. O'CONNOR,
O'CONNOR & LEWIS,
Bank of Sacramento Bldg.,
629 J Street,
Sacramento, California,

and

BAKER, JORDAN & FOREMAN,
1610 Tower Petroleum Bldg.,
1907 Elm Street,
Dallas, Texas,
Attorneys for Appellants.

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To the Honorable Court of Appeals:

This appeal is taken from an Order of the United States District Court for the Northern District of California, Southern Division, entered on March 16, 1967, granting a preliminary injunction to the Appellee, Southern Pacific Company, enjoining Appellants from continuing a work stoppage instituted on or about March 12, 1967, and all acts in furtherance thereof, and from picketing or interfering with the

orderly and prompt continuation of work in Appellee's operations. The complaint filed by Appellee sought an injunction terminating such work stoppage and seeking damages in the amount of $2,000,000.00 per day. Although the Appellee railroad unilaterally instituted a practice directly contrary to many years of practice in the industry, and contrary to an existing agreement between the Switchmen's Union and Appellee, without proper notice to Switchmen's Union under the Railway Labor Act, the District Court found that this was a minor dispute under the Railway Labor Act, concluding that the work stoppage was caused and conducted by Appellants in violation of the Railway Labor Act. Thereafter, Appellants gave Notice of Appeal, and have now duly perfected the present Appeal from the Judgment of the District Court entered against them.

PRELIMINARY STATEMENT

The underlying dispute of the strike and work stoppage called by Appellant, Switchmen's Union of North America, on March 12, 1967, arose out of these facts: Prior to Friday, February 20, 1967, four yardmasters, including one J. D. Shockley, were employed by Appellant on its property at Tucumcari, New Mexico; as of that date the last of the four Tucumcari yardmaster positions, including that held by Yardmaster Shockley, was abolished by Appellant. On March 11, 1967 Yardmaster Shockley was permitted by Appellee to displace Yardmaster James L. Hill, at Southern Pacific's Tucson Yard, who at that time held a yardmaster position at Appellee's property at Tucson, Arizona. Yard-

master Hill had been promoted to yardmaster in the Tucson Yard under Article 12 (a) of a yard agreement, dated September 1, 1956, then in existence between Appellant, Switchmen's Union of North America, and Appellee, Southern Pacific Company, which section read as follows:

> "Section (a). Switchmen will be promoted in their respective yards, helper to foreman, foreman to yardmaster; seniority and ability to govern. As a prerequisite to promotion to yardmaster, it will be necessary for the applicant to have served at least one (1) year (306 days) as engine foreman in the yard where promoted * * *"

As of March 11, 1967, employees of the Southern Pacific Company of the craft of yardmen and switchmen were represented by Switchmen's Union of North America, and the yardmaster employees of Southern Pacific were represented by Railroad Yardmasters of North America, Inc..

On March 29, 1965, the Railroad Yardmasters of North America, without the knowledge, consent, or participation of Appellant, entered into an agreement with the Southern Pacific and adopting the following rule as Article 8, Section (a) of such agreement:

> "Yardmasters included within the scope of this agreement constitute one seniority class. A yardmaster's seniority will begin from the date that he is assigned to a position by assignment notice, except as otherwise provided in this article, and shall be confined to the yard where promoted as long as yardmaster's service is maintained in such yard. In the event all yardmasters' service is thereafter discontinued at such yard, any yardmaster who transfers therefrom to another yard where yardmaster's service is maintained, within six months of the date the last yardmaster's assign-

> ment is discontinued, shall be accorded the same seniority date as yardmaster in the yard to which he transfers except that any yardmaster promoted in that yard prior to June 1, 1963 will have protected seniority in that yard * * *
>
> Any yardmaster who transfers to another yard under this provision will qualify for yardmaster's service in that yard on his own time."

The affidavit of John Burge correctly describes the history and development of practices of Southern Pacific on this particular point (R. 26).

It is undisputed that Yardmaster Shockley had not completed 306 days of service as an engine foreman in the Tucson Yard as of March 11, 1967, as had Yardmaster Hill, whom he displaced. Appellants contended in the trial court that Article 8, Section (a) of the Railroad Yardmasters Agreement was in direct conflict not only with Section 12 (a) of the Agreement then in effect between Switchmen's Union of North America and Southern Pacific, but also with 47 years of established practices with Switchmen's Union and 27 years of established practices with Railroad Yardmasters of America, and therefore the action of Southern Pacific in unilaterally promulgating Article 8, Section (a) and displacing Yardmaster Hill with Yardmaster Shockley on March 11, 1967, was a direct and unequivocal unilateral abrogation of the rule then in effect with Switchmen's Union as well as a unilateral abrogation of the long established practices. Appellants further contended that a major dispute was created, and since no Section 6 Notice had been given to them Appellee violated the Railroad Labor Act, and that a labor dispute, within the meaning of the Norris LaGuardia Act,

29 U.S.C., Sections 101 through 115, was created. Appellants took the position in the trial court that this matter involved a major dispute within the meaning of Section 6 of 45 U.S.C. 156, relegating and freeing Appellants to use self-help, including a work stoppage, and that Appellee was not entitled to an injunction under the Railway Labor Act, 45 U.S.C. 151, et seq., and the Norris LaGuardia Act, 29 U.S.C. 101, et seq.

POINTS OF ERROR

FIRST POINT OF ERROR

The District Court erred in granting injunctive relief to Appellee because the work stoppage involved in this case was the result of a major dispute under the Railway Labor Act, 45 U.S.C. 151.

SECOND POINT OF ERROR

The District Court erred in granting injunctive relief in this case for the reason that such action violates the provisions of the Norris-LaGuardia Act, 29 U.S.C. 101.

THIRD POINT OF ERROR

The District Court erred in granting injunctive relief herein without making a specific finding that Appellee complied with all obligations imposed by law and made every reasonable effort to settle the dispute underlying this work stoppage either by negotiation or with the aid of any available governmental machinery or of mediation or voluntary arbitration, as required by Section 108 of the Norris-LaGuardia Act, 29 U.S.C.

POINTS OF ERROR — (Restated)

FIRST POINT OF ERROR — (Restated)

The District Court erred in granting injunctive relief to Appellee because the work stoppage involved in this case was the result of a major dispute under the Railway Labor Act, 45 U.S.C. 151.

SECOND POINT OF ERROR — (Restated)

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THIRD POINT OF ERROR — (Restated)

The District Court erred in granting injunctive relief herein without making a specific finding that Appellee complied with all obligations imposed by law and made every reasonable effort to settle the dispute underlying this work stoppage either by negotiation or with the aid of any available governmental machinery or of mediation or voluntary arbitration, as required by Section 108 of the Norris-LaGuardia Act, 29 U.S.C.

STATEMENT, ARGUMENT AND AUTHORITIES

On the Southern Pacific Lines in question, since 1918, switchmen, irrespective of which union was certified, have had the exclusive right of promotion or appointment from switchmen to yardmaster, and yardmen promoted in respective yards only had yardmaster seniority in the yard where promoted. This practice was uniformly applied on the

Southern Pacific Lines even after passage of the amendment to the Railroad Yardmasters of America agreement on March 29, 1965. It is the position of Appellants that Southern Pacific, had no right unilaterally to change and abolish this established practice of promoting switchmen to yardmasters in such yards in this manner or to nullify and abrogate the rule in the bargaining agreement between Switchmen's Union and Southern Pacific in this respect without service of a Section 6 Notice and the utilization of the procedures set up under the Railway Labor Act, 45 U.S.C. 156, which provides as follows:

> "Sec. 156 Procedure in changing rates of pay, rules and working conditions
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926 c. 347 Sec. 6, 44 Stat. 582; June 21, 1934, c. 691, Sec. 6, 48 Stat. 1197."

In *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers, et al*, 307 F. 2d 21, the Court, in determining whether a railroad was entitled to an injunction to halt a strike, the railroad had sought unilaterally to change train runs. The Court noted that the dispute between the carrier and employees was not whether or not the train runs in question should be rescheduled, but instead whether the railroad had the unilateral right to make them without negotiating about them with the unions, which is also a vital part of the disagreement in this case. The Court, in attempting to apply the test as to what is a "major" and "minor" dispute formulated in *Elgin, J&E Ry. v. Burley*, 325 U. S. 711, held:

> "*It is a major dispute if the present agreements between the railroad and the brotherhoods contain express provisions contrary to the position taken by the railroad or if the clear implication of these agreements is inconsistent with the railroads' proposals.* It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretations of the language of the agreements." (Emphasis ours).

In this case Southern Pacific has taken a position in direct contradiction of the express provisions of the Switchmen's Union Agreement, and the clear implication of such agreement. Further, the action of the railroad is certainly not supported by customary and ordinary interpretations of the language of the agreements or by the established practices since 1918, but is clearly and specifically contrary to them. Hence this is a major dispute, and the railroad was not

entitled to the injunctive relief granted by the Court below; the *Rutland case*, supra, should control here. The Court, in *Rutland*, supra, determined that in the agreement there before the Court there were some provisions which by themselves did not bestow the right upon the railroad unilaterally to change train runs and home terminals, but did give some indication of an implicit recognition of such a right in the carrier and that therefore the ensuing dispute was a minor dispute. Here there is no such implicit recognition, either in the Switchmen's agreement or in the established practices and working conditions. However, the Court noted that the Supreme Court of the United States in *Brotherhood of R.R. Trainmen v. Toledo P&W R.R.*, 321 U. S. 50, has insisted upon compliance with Section 108 of the Norris-LaGuardia Act, which provides as follows:

> "Sec. 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief.
>
> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Sec. 8, 47 Stat. 72."

The Court then held:

> "In the present case the District Court made no *finding* whether the management of the railroad made the good faith efforts which we have held to be a prerequisite to the obtaining by it of injunctive relief * * *

> Therefore we must remand the case for the District Court to determine whether the railroad *made reasonable efforts* to settle this dispute in conference. See Pa. R.R. v. Transport Workers Union, 178 F. Sup. 30 (E.D. Pa. 1957) (Finding No. 15), Appeal dismissed, 3 Cir., 278 F. 2d 693 (1960). If the District Court finds that the railroad has not done so, it should not issue the injunction until the railroad has perfected its right to such relief by compliance with its statutory obligation."

In the instant case, the Complaint of Appellee seeking injunctive relief in this cause (R. 1), is totally devoid of any pleading that it brought itself within Section 108 of the Norris-LaGuardia Act, nor did the District Court below make any finding of fact regarding any such efforts made or any conslusion as to the reasonableness thereof, as required by 29 U.S.C. 108, in its Order granting the preliminary injunction on March 16, 1967.

The District Court erred in awarding injunctive relief to Appellee without making the required findings necessary under the Norris-LaGuardia Act, under the authority of *Brotherhood R.R. Trainmen of Toledo P&W R.R.*, supra, and *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*, supra. The pertinent provisions of the Norris-LaGuardia Act, 29 U.S.C. 101, et seq., provides as follows:

> "Sec. 101. Issuance of restraining orders and injunctions; limitation; public policy
>
> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent

injunction be issued contrary to the public policy declared in this chapter. Mar. 23, 1932, c. 90 Sec. 1, 47 Stat. 70."

"Sec. 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90 Sec. 4, 47 Stat. 70."

"Sec. 113. Definitions of terms and words used in chapter.

When used in this chapter, and for the purposes of this chapter —

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs,

> or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.
>
> (d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia, Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."

The question on this appeal revolves primarily around whether or not this labor dispute constituted a "major dispute", or a "minor dispute", and in either case, whether the provisions of the Norris-LaGuardia Act prohibit the issuance of an injunction under such circumstances. It is fairly well settled as a general proposition that under certain circumstances a minor dispute, involving the interpretation and application of an existing collective bargaining agreement, which has not been decided by the National Railroad Adjustment Board, is enjoinable. *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.*, 353 U. S. 30 (1957); *Louisville & Nashville R.R. v. Brown*, 252 F. 2d 149 (5th Cir. 1958). Such cases hold that where a minor dispute occurs, it is necessary to construe the general provisions of the Norris-LaGuardia Act in a fashion so as not to do vio-

lence to the specific provisions of the Railway Labor Act, thus protecting the jurisdiction of the Railway Adjustment Board. Here, no application or interpretation is necessary; under the *Rutland case*, supra, this case involves a unilateral change in an agreement and established working conditions. It is equally well settled that the Railway Labor Act limits the Railroad Adjustment Board's jurisdiction to disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretations or applications of agreements concerning working conditions, and that no jurisdiction is conferred over disputes arising out of proposed or intended changes in the terms or application of the existing agreements, and that the Norris-LaGuardia Act does apply to labor disputes where its application is in conformity with the policy of the Railway Labor Act, thus prohibiting enjoying a work stoppage. *Brotherhood of R. Trainmen v. Toledo, P. & E. R. Co.*, 321 U. S. 50 (1944); *O.R. T. v. C&NW R. Co.*, 362 U. S. 330 (1960); *Butte, Anaconda, & P. Ry. Co. v. Brotherhood of L.F.&E*, 269 F. 2d 54, cert. den., 361 U. S. 864; *MKT Ry. v. Randolph*, 164 F. 2d 4, cert. den., 334 U. S. 818.

The Supreme Court of the United States, in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 89 L. Ed. 1886, first formulated the often cited attempted definition of what constitutes a major and minor dispute:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore

> the issue is not whether an existing agreement controls the controversy. They look to the acquisition of the rights for the future, not to assurtion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In both types of disputes, major and minor, the Railway Labor Act requires that as a first step the parties make every reasonable effort to settle their differences in conference; in a major dispute, the subsequent procedure for the party intending to make a change in contract terms as written or established by practice and interpretation is a Section 6 Notice, followed by conference, referral to mediation, arbitration, and lastly, the creation of an Emergency Board by the President of the United States. The Railway Labor Act does not create any tribunal having final authority to decide a major dispute, and therefore there is no prohibition against a peaceful work stoppage when such procedures have been exhausted without settlement. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U. S. 30; *Brotherhood of R.R. Trainmen v. Toledo, P&W R.R.*, 321

U. S. 50; *Order of R.R. Telegraphers v. Chicago & N.W. R.R.*, 362 U. S. 330. Here, Southern Pacific unilaterally changed the existing terms of the Switchmen's Union agreement and established pactices without complying with any of such procedures set out above as contemplated and provided for by the Railway Labor Act.

This case does not present facts illustrating a jurisdictional dispute between two unions as to which craft or class of employees is entitled to do any specific work, as in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946) and *Transportation Communication Employees Union v. Union Pacific R.R.*, 385 U. S. 157, which disputes were held, to be minor disputes, primarily on the basis that the question of what should properly constitute a class or craft of employees is historically a question fraught with technicalities and requiring special expertise and knowledge of the railroad industry, which is what gave rise to Congress granting jurisdiction to the Railway Adjustment Board in the first instance. Here, the work being done by Yardmaster Shockley on March 11, 1967 was admittedly to be performed by the craft of yardmasters, and Switchmen's Union of North America raises no question here but that such position was properly filled by a person belonging to the class of employees known as yardmasters. The specific position would have been filled in any event by a yardmaster; the simple fact remains that in this instance a yardmaster was promoted

to such position in the Tucson Yard in specific violation of the agreement of the Switchmen's Union governing the promotion of yardmasters from switchmen in that particular yard, and we do not believe the record is contradicted that the rules regarding promotion of yardmasters from switchmen was quite properly a function of the Switchmen's Union of North America under long and well established practices concerning these working conditions and the express terms of the bargaining agreements. It should be made clear to this court that Appellant, Switchmen's Union of North America, is not attempting to bargain or represent in any fashion members of the craft of yardmaster; however, it is entitled to bargain and represent yardmen/switchmen and the requisites and requirements of promotion to yardmaster, which is within its jurisdiction, and is entitled to insist that the railroad not make a unilateral change in the terms of their working agreement and the established practice and application of such agreement without complying with the Railway Labor Act.

Unlike the *Pitney case*, supra, which involved a dispute as to which craft of employees, conductors or trainmen, would operate certain trains, and where all parties sought to support their particular interpretation of their agreements by evidence as to practices, customs and where the factual question was intricate and technical, compelling the court to defer such questions to the Railroad Adjustment

Board, even a cursory examination of the instant case reveals that the railroad here has by its actions simply abrogated a long standing practice concerning working conditions and the clear provisions in the Switchmen's Union Agreement, not as to what class of employees or craft would perform the work in question, but as to which men would be promoted from the ranks of the switchmen. The same is true with reference to the *Transportation—Communication Employees Union case*, supra, where there was a factually complicated question as to whether the clerks or telegraphers as a craft should perform jobs remaining after automation. The case of *Southern Pacific Company v. Switchmen's Union of North America*, 356 F. 2d 332, cited by Appellee to the Court below, is also not in point for the same reasons.

It is the position of Appellant that the proposed change in working conditions by Southern Pacific will result in a change in such bargaining agreement, that is, if Southern Pacific is able to assign yardmasters in yards where they have not served 306 days as an engine foreman in direct contradiction of Section 12 (a) of the Switchmen's Agreement. Whether or not a proposed change is actually to be reflected or will effect a change in an existing agreement is to be tested as a matter of substance, inasmuch as a carrier in imposing changes in no wise contemplated or arguably covered by an agreement is not to escape the impact of the act merely through its unilateral action which it pur-

posely intends not to become a part of a written agreement. *United Industrial Workers of Seafarers International Union of North America, et al v. Board of Trustees of the Galveston Wharves, et al,* 351 F. 2d 183; *Florida East Coast Railway v. Board of Railroad Trainmen,* 336 F. 2d 172; *Florida East Coast Ry. Co. v. United States,* 348 F. 2d 682. These cases illustrate a carrier is not entitled to take unilateral action in clear and specific contradiction to existing terms of a collective bargaining agreement without creating a major dispute which leaves the union the lawful right to use self-help.

CONCLUSION

The judgment against Appellants cannot be sustained because the underlying dispute herein is a major dispute under the Railway Labor Act because the carrier has sought to unilaterally change existing terms of a collective bargaining agreement and forty-seven years of established practices without proper notice to Appellants, and the granting of an injunction in such a labor dispute is prohibited by the Norris-LaGuardia Act, and because the District Court failed to make a finding that Appellee complied with all obligations inposed by law and made every reasonable effort to settle the dispute underlying this work stoppage as specifically required by Section 108 of the Norris-LaGuardia Act.

WHEREFORE, Appellants respectfully pray that the judgment of the Trial Court be in all things reversed and for

such other and further relief, in law or in equity, which the Court deems proper.

Respectfully submitted,

LEO M. O'CONNOR,
O'CONNOR & LEWIS,
Bank of Sacramento Bldg.,
629 J Street,
Sacramento, California,

and

BAKER, JORDAN & FOREMAN,
1610 Tower Petroleum Bldg.,
1907 Elm Street,
Dallas, Texas,

By: Russell M. Baker
Attorneys for Appellants.

CERTIFICATE OF SERVICE

I, RUSSELL M. BAKER, Attorney of Record for the Appellants do hereby certify that I served the above and foregoing Brief of Appellants upon Honorable WILLIAM R. DENTON, Attorney for Appellee herein, on the 13th day of March, 1968, by mailing a copy to him at 65 Market Street, San Francisco, California 94015, by certified mail, last known address of Attorney for Appellee.

Russell M. Baker
Russell M. Baker

STATEMENT OF JURISDICTION

The [illegible] for the Ninth Circuit has jurisdiction

[illegible] by virtue of Section 1292 (a)